IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 283

WESLEY GREENE,

Petitioner,

vs.

THE ART INSTITUTE OF CHICAGO, an Illinois corporation not for profit, and the NORTHERN TRUST COMPANY, a corporation, Trustee and Executor of the Estate of Benjamin F. Ferguson, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Wesley Greene, prays that a Writ of Certiorari issue to The Appellate Court of Illinois, First District, to review a judgment of the Supreme Court of Illinois denying Petitioner's leave to appeal from The Appellate Court of Illinois, First District, entered May 20, 1958. The record in this case has been returned by the Supreme Court of Illinois to the Appellate Court of Illinois, First District.

CITATION TO OPINIONS BELOW.

The Supreme Court of Illinois did not write an opinion in its denial of Petitioner's leave to appeal from the judgment of the Appellate Court of Illinois. The opinion of the Appellate Court of Illinois, First District, is reported in 16 Ill. App. 2d 84, and is printed in Appendix A hereto, *infra*, pp. 1a-5a.

JURISDICTION.

The denial by the Supreme Court of Illinois of Petitioner's leave to appeal from the Appellate Court of Illinois, First District, was entered on May 20, 1958. Appendix D, *infra*, p. 7a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). Appndix F, *infra*, p. 9a.

QUESTION PRESENTED.

Whether the State of Illinois, without contravening the due process clause of the Fourteenth Amendment to the United States Constitution, denied Petitioner, a contemplated beneficiary of a public charitable trust, his standing as an interested party in an action against the Respondents, trustees of a charitable trust, to vacate and set aside contrived orders of court, for restraining orders and other relief, under a common-law rule which directs that the Attorney General of Illinois has exclusive authority to represent the public in the construction or administration of a public charitable trust, when the cause of action by Petitioner charges that the decrees previously entered, in which the Attorney General of Illinois was named as the only necessary party defendant, were procured through the fraud and collusion of one of the Respondents and in which the Attorney General acquiesced, and repudiated the clear intent and language of the settlor of the public charitable trust.

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved in this Petition is Amendment XIV of the United States Constitution and that portion thereof which provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The pertinent portion of the Fourteenth Amendment is set out in Appendix E, *infra*, p. 9a.

STATEMENT.

On April 10, 1905 Benjamin F. Ferguson died a resident of Cook County, Illinois leaving a Last Will and Testament which included, as charged in the Complaint, the following provision:

> "My said Trustee after paying the bequests hereinabove mentioned and establishing or realizing and keeping in tact a permanent trust fund of not less than $1,000,000.00 shall annually thereafter or oftener, if required, pay the entire net income arising therefrom (after deducting its compensation as Trustee herein mentioned) to The Art Institute of Chicago, to be known as the B. F. Ferguson Monument Fund and entirely and exclusively used and expended by it under the direction of its Board of Trustees in the erection and maintenance of enduring statuary and monuments, in the whole or in part of stone, granite, or bronze, in the parks, along the boulevards, or in other public places within the City of Chicago, Illinois, commemorating worthy men or women of America, or important events in American History. The plans or designs for such statuary or monuments and the location of the same shall be determined by the Board of Trustees of such Institute." (Abst. 3).

On May 22, 1933 the Circuit Court of Cook County entered a decree in a case brought by Respondent, The Art Institute of Chicago, in which the court construed the word

"monument" as used in the paragraph of the Ferguson will, quoted above, to mean and include a memorial building. The building authorized by the 1933 decree was never constructed. In 1956 Respondent, The Art Institute of Chicago, brought another action in the Circuit Court of Cook County in which a decree was entered which authorized the construction of a memorial building at a designated site upon land owned by the Chicago Park District. (Abst. 7-11). In both the 1933 and 1956 cases the defendant named in the respective complaints was the Attorney General of Illinois. No other parties were named as defendants.

The building authorized to be erected by the 1956 decree is to be used by Respondent, The Art Institute of Chicago, and is constructed adjacent to the present building of The Art Institute of Chicago and for all practical purposes is an extension of its main building.

Respondent, The Northern Trust Company, was named testamentary trustee of the Last Will and Testament of Benjamin F. Ferguson and, as provided in the pertinent paragraph of the said Will, *supra,* p. 4, had the fiduciary duty of paying over the net income of the trust corpus in accordance with the directions of the Respondent, The Art Institute of Chicago. Respondent, The Northern Trust Company, did not join with The Art Institute of Chicago in either of the actions instituted in 1933 or 1956.

As alleged in Petitioner's Complaint the first notice he had of the 1933 and 1956 decrees was through newspaper articles and widespread publicity resulting from the announcement by Respondent, The Art Institute of Chicago, that it was to proceed with the construction of the Ferguson Memorial Building adjacent to it. (Abst. 3).

On April 10, 1957 Petitioner filed a Complaint in equity in the Superior Court of Cook County as a citizen, resident and taxpayer of the City of Chicago, on behalf of himself, and all citizens, residents and taxpayers of the said City similarly situated seeking, *inter alia*, an accounting by and substitution of Respondents as trustees of the trust created by Benjamin F. Ferguson and a setting aside of the two decrees entered in 1933 and 1956. (Abst. 1-5).

Petitioner alleged in his Complaint, *inter alia*, that the decree entered in 1933 was procured by the fraud and collusion of Respondent, The Art Institute of Chicago, and the Attorney General of Illinois; that Respondent, The Art Institute of Chicago, set out to capture and appropriate the Ferguson Monument Fund for its private use and gain in violation of its trust and contrary to the unambiguous language of the Last Will and Testament of B. F. Ferguson; that Respondent, The Art Institute of Chicago, through its agents and attorneys drafted its Complaint, the Answer of the Attorney General and the decree and order of court not only on the same typewriter, but also using the same "blue-backs" of counsel for The Art Institute; that the filing of the Complaint, the Answer of the Attorney General and the entry of the decree and order all took place *within the space of one hour;* that, contrary to the recitations in the decree of 1933, no oral testimony was taken and there was no argument by counsel; and that the Attorney General of Illinois was only a nominal party defendant and did not properly and adequately represent the interests of Petitioner and the general public. (Add. Abst. 6-17). The Complaint further alleged that Respondent, The Northern Trust Company, the testamentary trustee of the Ferguson Memorial Fund, acquiesced in the collusive and fraudulent conduct of The Art Institute of Chicago, by its inaction. (Add. Abst. 15-16).

For twenty-eight years the B. F. Ferguson Monument Fund was administered by Respondents under the terms of the Will and in accordance with the intent of its settlor. During this period the word "monument" was free of ambiguity. The Complaint of Petitioner amply charges that Respondent, The Art Institute of Chicago, was apparently of the persuasion that the funds of the trust, in excess of $1,000,000, could best commemorate American history by being lavished upon itself. The avarice of Respondent, The Art Institute of Chicago, could not be sated despite the following provision of the Last Will and Testament of Mr. Ferguson, as set forth in the Complaint (Add. Abst. 8):

> "My said Trustee shall further pay out of the income of my estate the sum of One Thousand Dollars per year to The Art Institute of Chicago, the same to be received and known as The B. F. Ferguson Annuity."

The federal question was presented in the complaint in the following language (Add. Abst. 7):

> "That by virtue of the aforesaid wrongful proceedings the defendant, The Art Institute Of Chicago, succeeded in capturing the entire B. F. Ferguson Monument Fund as accumulated, all of which was in violation of plaintiff's property rights in the said Fund; that by the acts alleged herein defendants violated plaintiff's rights of due process of law as guaranteed to him and others similarly situated, under Article II, paragraph 2, of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the United States Constitutions;"

On April 22, 1957 the Respondents moved to dismiss Petitioner's complaint on the grounds, *inter alia*, that Petitioner did not have legal capacity to sue and the alleged cause of action was barred by a prior judgment; that the

complaint did not allege facts sufficient to justify the conclusion of Petitioner that he had a direct interest in the B. F. Ferguson Monument Fund or in its administration; that the complaint did not contain allegations sufficient to establish that Petitioner had been deprived of property without due process of law; that the allegations were vague, indefinite and uncertain and substantially insufficient at law and in equity and the complaint was based upon a misstatement and misunderstanding of the duties and authority of the Attorney General of Illinois. (Abst. 5-7, 11-12).

By an order entered in the Superior Court of Cook County on May 3, 1957 the separate motions of the Respondents to dismiss and strike the complaint were granted. (Abst. 13).

Petitioner then took an appeal to the Appellate Court of Illinois, First District, from the judgment of the Superior Court of Cook County. The Appellate Court affirmed the judgment of dismissal on January 15, 1958. This opinion is reprinted in Appendix A, *infra*, pp. 1a-6a, and was published in 16 Ill. App. 2d 84. The Appellate Court held that the Petitioner was properly represented by the Attorney General of Illinois in both 1933 and 1956; that the Attorney General of Illinois is the proper party to represent the public in actions involving charitable trusts; that as a member of the general public Petitioner did not have a property interest in the charitable trust; that Petitioner did not allege how he would be damaged as a taxpayer and hence did not come within the class of taxpayers who are damaged by the administration of a charitable trust; that sufficient facts were not alleged to show fraud in the actions of the Attorney General of Illinois; and there was no allegation of fraud which would warrant the considering of the complaint as a bill in the nature of a bill of review.

Petitioner's petition in the Appellate Court of Illinois, First District, praying for a rehearing in the cause was denied. Appendix C, *infra*, p. 8a. On May 20, 1958 the Supreme Court of Illinois denied Petitioner's petition for leave to appeal from the judgment of the Appellate Court, First District. Appendix D, *infra*, p. 9a.

The record in the case was returned by the Supreme Court of Illinois to the Appellate Court of Illinois, First District, which is the reason this Petition for a Writ of Certiorari prays that the Writ issue to the said Appellate Court.

REASONS FOR GRANTING WRIT.

It is clearly established that in Illinois upon a motion to dismiss a complaint, its well-pleaded allegations must be taken as true and all reasonable inferences drawn in favor of the plaintiff. *Espadron* v. *Davis*, 385 Ill. 304; *People* v. *Evans*, 412 Ill. 616. The Supreme Court in *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, in a case arising out of the Kentucky state courts stated at p. 474, "Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true." It is equally clear that one of the few grounds warranting a collateral attack on a decree entered for the purpose of defrauding a third person is fraud. *Atlas Nat. Bank* v. *More*, 152 Ill. 528; *Elting* v. *First Nat. Bank*, 173 Ill. 368; *Wing* v. *Little*, 267 Ill. 20; *People* v. *Chicago, Burlington Quincy RR. Co.*, 247 Ill. 340.

If it were conceded, *arguendo*, that the common-law rule in Illinois as enunciated by its courts would bar the Petitioner from bringing this action by the doctrine of *res judicata*, it does not follow that the Supreme Court of the

United States may not inquire into the rule if there is a violation of the Due Process Clause of the Fourteenth Amendment. *Postal Telegraph Cable Co.* v. *Newport, supra,* was a case in which the Supreme Court reviewed the procedure of the State of Kentucky involving the collection of certain state taxes and the Court stated at pp. 474-475 that "*Res judicata,* like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law in this case, independent of the federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for that judgment?"

The Illinois decisions, as expressed in the Appellate Court opinion below, Appendix A, appear to rest upon the syllogistic mesmerism of a rule which proceeds as follows: Only the Attorney General of Illinois may represent the general public in actions involving charitable trusts; this is an action involving a public charitable trust; Petitioner is not the Attorney General of Illinois; therefore, Petitioner may not bring this action and is bound by any previous decrees to which the Attorney General was a party. The rule thus announced precludes Petitioner's action even though in his Complaint he alleges the two previous decrees, obviously pre-arranged or contrived, were obtained fraudulently and the Attorney General gave only indifferent, token representation.

Thus, the Supreme Court of Illinois has sanctioned a rule of law which in effect immunizes both the Attorney General of Illinois and the trustees of a charitable trust

from a collateral attack once the trustees have succeeded in procuring a fraudulent decree by which the trustees capture the trust.

If the allegations in Petitioner's complaint are true, as they must be regarded upon a motion to dismiss, it is evident a gross wrong has been committed. A trustee of a charitable trust ought not to be permitted to convert trust funds committed to his care through a fraudulent and collusive decree to which the Attorney General was but a nominal and inadequate party. The State of Illinois provides no remedy to right this wrong. It is this failure of the State to provide an adequate remedy which Petitioner contends violates his property rights without due process of law under the Fourteenth Amendment to the United States Constitution.

It may also be conceded, *arguendo*, that under classical doctrine a member of the public does not have a property interest in a charitable trust as the Appellate Court so held in its decision. Appendix A, *infra*, p. 5a. The rule is one of convenience. It is to obviate a series of suits by members of the general public against trustees of a charitable trust. In the ordinary case of the administration of charitable trusts the rule is warranted. But the rule must be different when an attack is made upon a decree previously entered in which it is complained that it was procured by fraud and collusion.

It is obvious that the Petitioner and other citizens and taxpayers of the City of Chicago were intended and do stand to benefit under the terms of the testamentary trust created by B. F. Ferguson. One distinguished writer poses the question thus:

> "The courts do not give us a clear picture of their theories regarding the equitable property interest in

the cases of a charitable trust. Some courts state that equitable title to the trust *res* vests in the whole public or the class of the public to be benefited. Others seem to be of the opinion that the equitable interest vests in the private individuals selected as *cestuis* from time to time. . . . Or a court may take the position that strict property theories are relaxed in the case of a charitable trust, and that it is not necessary to find that the equitable title vests in any person or group at the commencement of the trust. It is evident that the courts, in their favorable treatment of charitable trusts, are not concerned with technical property concepts but rather are content with allocating to a competent party the power to enforce the charity." (Bogert, Trusts, 1953 ed., Vol. 2A, p. 282)

The issue raised in this Petition has never been decided by this Court. Due process of law has never been a phrase with an immutable content. "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. . . . The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion'". *Wolf* v. *Colorado*, 338 U.S. 25, 27. See also *Communications Comm'n.* v. *WJR*, 337 U.S. 265.

It is submitted by Petitioner that the Due Process clause of the Fourteenth Amendment does embrace within its ambit a rule permitting a private citizen to attack collaterally a former decree on the grounds of collusion and fraud in cases of public charitable trusts without being

barred by common-law stringencies turning on technical property concepts. A public charitable trust is for the benefit of the general public and thus is affected with a public interest with the general public as its contemplated and intended beneficiaries. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginia Ry.* v. *Federation*, 300 U.S. 515, 552. *Cf. Pennsylvania* v. *Williams*, 294 U.S. 176, 185.

Petitioner's complaint alleged that his first knowledge of the decrees entered in 1933 and 1956 was obtained from newspaper publicity attendant upon the announcement by The Art Institute of Chicago that it would proceed with the construction of the Memorial Building. (Abst. 3). At the time of the entry of the decrees Petitioner was given no notice of the pendency of the actions and, of course, was given no opportunity to be heard. "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U.S. 1, 16; *Pennoyer* v. *Neff*, 95 U.S. 714. There is no question that a common-law rule enunciated by a state court may deny a citizen of due process of law as effectively as a state statute. *Shelley* v. *Kraemer*, *supra*, p. 16; *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

The complaint of Petitioner charges that the representation by the Attorney General of Illinois of the general public in the 1933 action instituted by Respondent, The Art Institute of Chicago, was inadequate, nominal and acquiescent. The complaint charges that the answer of

the Attorney General not only was drafted by the attorneys and agents of Respondent, The Art Institute of Chicago, but was typed on the same typewriter and "blue-backed" by the counsel for the said Respondent and, furthermore, the filing of the Complaint, the Answer and the entry of the decree and order of court took place *within a period of one hour.* (Abst. 4). No reasonable interpretation of the operative clause of the Last Will of Benjamin F. Ferguson warrants the conclusion he intended that the trustee he named to carry out the trust, Respondent, The Art Institute of Chicago, could appropriate the entire fund for its own purposes through the artifice of calling an administration building a "monument."

Hansberry v. *Lee*, 311 U.S. 32, involved a class or representative action instituted in the Circuit Court of Cook County seeking to enforce a restrictive covenant which provided that it should not be effective unless signed by ninety-five per cent of the owners in the area. To the defense that the agreement had never become effective because owners of ninety-five per cent of the frontage had not signed the agreement, the plaintiffs pleaded that that issue was *res judicata* by a decree in an earlier suit involving the same covenant. *Burke* v. *Kleiman*, 277 Ill. App. 519. The Circuit Court after a trial on the merits found that the owners of about fifty-four per cent of the frontage had signed the agreement and that the only support of the judgment in the *Burke* case, *supra*, was a false and fraudulent stipulation of the parties that ninety-five per cent of the owners had signed the agreement. Nonetheless, the Circuit Court ruled that the issue of the condition precedent to the validity of the agreement was *res judicata* and entered a decree for the plaintiffs. The Supreme Court of Illinois affirmed the Circuit Court, 372 Ill. 369, and the Supreme Court of the United States granted certiorari.

The Supreme Court of Illinois in *Hansberry* v. *Lee*, 372 Ill. 369, held that even though the finding in the previous action that ninety-five per cent of the owners had signed the agreement was erroneous the only way that it could be upset was by direct attack and for purposes of the case before it this was *res judicata*. The Supreme Court of the United States reversed and stated at 311 U.S. 40:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Despite the fact that *Hansberry* v. *Lee, supra*, was a class action and despite the holding of the Court that the interests of the litigants in the two actions were different, the policy underlying the holding announced in that case should, Petitioner respectfully urges, be applied to the present action.

Petitioner concedes that the common-law rules regarding the property interests of the general public in a charitable trust, the classical duty of the Attorney General to protect those interests, *res judicata* and collateral estoppel may militate against Petitioner's position. But Petitioner seeks to redress what it regards as a flagrant and contemptuous wrong committed against the general public of the State of Illinois by the fraudulent and collusive acts

of Respondent, The Art Institute of Chicago, and the feeble and *pro forma* representation of the Attorney General. The malleability of the common law, wherein lies its enormous strength, points to a yielding of its strictures to provide a remedy to right a wrong. This is the genius of the common law. This is the source of power from which this country derives its system of "ordered liberty."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LUIS KUTNER
Counsel for petitioner.

August 18, 1958.

APPENDIX A.

OPINION OF THE APPELLATE COURT.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County dismissing upon motions filed by the defendants, The Art Institute of Chicago and the Northern Trust Company, the cause of action based on the complaint filed herein.

The motion of the defendant The Art Institute of Chicago, an Illinois corporation not for profit, sets forth as grounds for dismissal and striking the complaint that it appears on the face of the complaint that it is an illegal and unwarranted collateral attack upon final orders of the Circuit Court entered in case No. B269011 on May 22, 1933 and in case No. 55C-249 on June 13, 1956, and that the complaint does not allege facts sufficient to justify the conclusion that the plaintiff has a direct interest in the B. F. Ferguson Monument Fund or its administration, and that the complaint contains no allegation of facts sufficient to establish that the plaintiff has been deprived of property without due process of law, and that the allegations of the complaint are vague and indefinite, consist of conclusions and are based upon a misunderstanding of the law relating to the duties of the Attorney General of the State of Illinois. The motion of the defendant Northern Trust Company, a corporation, trustee, in addition to the above allegations, sets forth that the complaint does not allege any facts showing any misconduct of any kind on the part of the Northern Trust Company or any instance in which that defendant failed to perform its full

duties as trustee under the will of Benjamin F. Ferguson, deceased, and that the complaint fails to allege any co-operation or condonation or ratification by the Northern Trust Company of any alleged diversion of the B. F. Ferguson Monument Fund, or any alleged misconduct of The Art Institute of Chicago, or that it in any manner participated in the two court proceedings of which the plaintiff complains.

It therefore becomes necessary to examine the allegations of the complaint. The complaint states that it seeks to vacate and set aside an order of the Circuit Court of Cook County erroneously entered on May 22, 1933 in case No. B269011, and an order entered by the same court on June 13, 1956 in case No. 55C-249. It seeks a redetermination as to the meaning of the language used in the last will and testament of Benjamin F. Ferguson relating to the B. F. Ferguson Monument Fund, the purposes of the fund and the duties of The Art Institute of Chicago as trustee of the fund. It further seeks an order for the removal of the Northern Trust Company as trustee under the will of Benjamin F. Ferguson under which it was directed to turn over the net proceeds of certain funds in its hands each year to the Art Institute of Chicago as the trustee of the B. F. Ferguson Monument Fund.

The complaint also alleged that in case No. B269011 a hoax was perpetrated on the plaintiff, and other persons similarly situated, by The Art Institute of Chicago in that through its attorneys it caused to be filed in the Circuit Court of Cook County the complaint asking the instruction of the court in regard to the use of money from the B. F. Ferguson Monument Fund, which had been created for the purpose of "the erection and maintenance of enduring statuary and monuments," for the purpose of building a memorial building connected with the Art Institute of.

Chicago, and that an answer for the Attorney General of the State of Illinois, Hon. Otto Kerner, was filed on the same day as the complaint and apparently had been prepared on the same typewriter, using the same stationery and the same blue-back as used in the preparation of the complaint—all of which resulted in the entry of a decree on the same day in accordance with the prayer of the petition of that plaintiff, The Art Institute of Chicago, permitting the construction of a memorial building, as a monument to B. F. Ferguson, at a certain location adjoining and a part of The Art Institute of Chicago.

The complaint is replete with such words as "hoax," "fraudulent plan," and "collusive" and "fraudulent" actions, and while the plaintiff takes great pains to state that the Honorable Otto Kerner was a man of great integrity, honesty and esteem, he in the same breath inconsistently alleged that Mr. Kerner was subservient to the combined prestige of The Art Institute of Chicago and the Northern Trust Company of Chicago and allowed them to dominate and dictate the proceedings which were bottomed and conceived in fraud.

The complaint also alleges that in case No. 55C-249, The Art Institute of Chicago again asked instructions from the court and leave to construct a building such as had been approved in the decree of May 22, 1933 in the foregoing proceeding, at another location—still adjoining The Art Institute. The decree entered granted the prayer of The Art Institute of Chicago. The complaint alleged that the Attorney General of the State of Illinois, The Honorable Latham Castle, who was made a party defendant to the later proceeding because it related to a charitable trust, "permitted himself to ratify the scheme and hoax that was perpetrated in case No. B269011."

There are no other allegations of fraud in the complaint.

The plaintiff also alleges that he is a citizen, resident and taxpayer of the City of Chicago, County of Cook and State of Illinois, and that his taxes will be affected by the outcome of this law suit, but he does not allege how the building of the memorial building out of the funds of the B. F. Ferguson Monument Fund will affect his taxes. The plaintiff then sets forth that he, with others so situated, are intended beneficiaries of the B. F. Ferguson Monument Fund.

It is obvious that the order of the Superior Court dismissing the complaint is proper for the following reasons: (1) The plaintiff, as a member of the general public of the State of Illinois, was properly represented in both of the former proceedings by the Attorney General of the State of Illinois, who is the proper person to represent the public in actions relating to charitable trusts (*Art Institute of Chicago* v. *Castle*, 9 Ill. App. 2d 473; *Peo. ex rel. Courtney* v. *Wilson*, 327 Ill. App. 231; *Kolin* v. *Leitch*, 343 Ill. App. 622); (2) The plaintiff is not a proper party plaintiff, either as a beneficiary of the B. F. Ferguson Monument Fund or as a taxpayer; first, because he has been represented as a member of the public by the Attorney General in so far as the B. F. Ferguson Monument Fund is concerned as a charitable trust, and has no further right to representation (*Art Institute of Chicago* v. *Castle*, *Peo. ex rel. Courtney* v. *Wilson*, and *Kolin* v. *Leitch*, *supra;* Bogert, Trusts and Trustees Vol. 2a, sec. 414); secondly, he as a member of the public has no property interest in that trust (*Barker* v. *Hauberg*, 325 Ill. 538, 551; *Art Institute of Chicago* v. *Castle*, *supra*, at page 479; Scott, The Law of Trusts (1956 ed.) Vol. 4, Sec. 391, p. 2760); thirdly, he has not alleged how he would be damaged as a taxpayer, and therefore does not come within the class of taxpayers who are damaged by the administration of a charitable trust (*Hartzell* v. *Hungate*, 223 Ill. App. 346, 350; *Art Institute of Chicago* v. *Castle*,

supra; Pear v. *City of East St. Louis*, 273 Ill. 501, 506); (3) There is no sufficient allegation of *facts* to show fraud in the actions of the Attorney General of the State of Illinois (*Smith* v. *Board of Education*, 405 Ill. 143, 148; *Owens* v. *Green*, 409 Ill. 380, 38[illegible]; *Barker* v. *Hauberg*, 325 Ill. 538, 550; *Peo. ex rel. Parker* v. *Board of Appeals*, 367 Ill. 559, 567; *Peo. ex rel. Callahan* v. *G. M. & O. R. R. Co.*, 8 Ill. 2d 66, 70); and (4) There is no allegation of fraud which would warrant the considering of the complaint as a bill in the nature of a bill of review (*Art Institute of Chicago* v. *Castle*, *supra; Wood* v. *First Nat. Bank of Woodlawn*, 383 Ill. 515, 522.)

There is not before us at this time the question of the meaning of the words "statuary and monuments," but that phraseology has been passed upon finally by the lower courts and again considered in this court in *Art Institute of Chicago* v. *Castle*, 9 Ill. App. 2d 473, and certainly there is nothing in the interpretation of those words by the courts which *per se* would indicate anything but the proper consideration by reasonable minds and only just determination available.

It is noted that most of these same matters—indeed if not quite all of them, were before the court on the intervening petition of the National Sculpture Society in regard to the last decree, entered June 13, 1956 in case No. 55C-249, to which plaintiff objects, and that the bringing of this complaint is so clearly an attempt to litigate for the third time a matter which had been disposed of in the lower court and which has now been brought to the Appellate Court for the second time, that it can only be considered an attempt to stir up litigation in a manner which is just short of being maintenance.

JUDGMENT AFFIRMED.

BURKE, *P. J.* and FRIEND, *J.* Concur.
Publish in full.

APPENDIX B.

WESLEY GREENE, Appellant,		
No. 47268	vs.	
THE ART INSTITUTE OF CHICAGO, an Illinois corporation not-for-profit, and the Northern Trust Company, a corporation, Trustee and Executor of the Estate of Benjamin F. Ferguson, deceased, Appellee.		Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the Record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the Record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective, and that in that Record there is no Error: Therefore, it is considered by the Court that the judgment aforesaid be Affirmed in all things, and stand in Full Force and Effect, notwithstanding the said matters and things therein assigned for Error.

And it is further considered by the Court that the said The Art Institute of Chicago, Certain Appellee, recover of and from the said Appellant its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

And it is further considered by the Court that the said The Northern Trust Company, as Trustee under the Will of Benjamin F. Ferguson, Deceased, Certain Appellee, recover of and from the said Appellant its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

Dated: January 15, 1958

APPENDIX C.

Wesley Greene, Appellant
47268 vs.
The Art Institute of Chicago, et al., etc., Appellees
} Appeal from Cook Superior
Error to

The Court having considered the petition of Appellant praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

Dated: January 30, 1958.

APPENDIX D.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of May in the year of our Lord, one thousand nine hundred and fifty-eight, within and for the State of Illinois.

[Here are listed the Justices present.]

Be It Remembered, that, to-wit: on the 20th day of May 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Wesley Greene,
Petitioner
No. 34802 vs.
The Art Institute of Chicago, an Illinois corporation not for profit, and the Northern Trust Company, a corporation, Trustee and Executor of the Estate of Benjamin F. Ferguson, Deceased,
Respondents

Petition for Leave to Appeal from Appellate Court
First District
57 S 5405
47268

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searey, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 26th day of May, 1958.

Mrs. Earle Benjamin Searey Clerk
Supreme Court of the State of Illinois

(Seal)

APPENDIX E.

Amendment XIV
United States Constitution

Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F.

28 U.S.C. Section 1257(3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 283

WESLEY GREENE,

Petitioner,

vs.

THE ART INSTITUTE OF CHICAGO, AN ILLINOIS CORPORATION NOT FOR PROFIT, AND THE NORTHERN TRUST COMPANY, A CORPORATION, TRUSTEE AND EXECUTOR OF THE ESTATE OF BENJAMIN F. FERGUSON, DECEASED,

Respondents.

BRIEF OF RESPONDENT, THE ART INSTITUTE OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE DUNHORP-WARREN PRINTING COMPANY, CHICAGO

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THE ART INSTITUTE OF CHICAGO, AN ILLINOIS CORPORATION NOT FOR PROFIT, AND THE NORTHERN TRUST COMPANY, A CORPORATION, TRUSTEE AND EXECUTOR OF THE ESTATE OF BENJAMIN F. FERGUSON, DECEASED,

Respondents.

BRIEF OF RESPONDENT, THE ART INSTITUTE OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A.

There Are at Least Two Inescapable Reasons Why the Petition for Writ of Certiorari Should Not Be Allowed.

1. Petitioner Waived Constitutional Questions in the Illinois Courts.

Petitioner elected to take an appeal from the *nisi prius* Court to the Appellate Court of Illinois, and not to appeal directly to the Supreme Court, as provided by Illinois statutes and cases. The Civil Practice Act of Illinois provides, "Appeals shall be taken directly to the

Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved." Ill. Rev. Statutes, Chap. 110, Sec. 75. Although a Constitutional question may have been raised by the pleadings in such case, or on trial, when the appellant takes his case to the Appellate Court and assigns errors of which that court has jurisdiction, he thereby waives any Constitutional questions.

The foregoing rule applies even though the Constitutional question be one involving the Constitution of the United States. *Parker* v. *The People of the State of Illinois*, 333 U. S. 571; s. c. 396 Ill. 583; *Central Union Telephone Company* v. *City of Edwardsville*, 269 U. S. 190. We quote from Judge Taft's opinion in the last cited case, at page 194:

> "But counsel for plaintiff in error insist that it is for this Court to determine finally whether a litigant in a state court has waived his federal right, citing *Davis* v. *O'Hara*, 266 U. S. 314; *Davis* v. *Wechsler*, 263 U. S. 22; *American Railway Co.* v. *Lewee*, 263 U. S. 19; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Union Pacific Railway Company* v. *Public Service Commission*, 248 U. S. 67. But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John* v. *Paullin*, 231 U. S. 583, 585: 'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when

Federal rights are in controversy than when the case turns entirely upon questions of local or general law,' —and many cases are there cited.

"It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided; but he gives up the right to raise constitutional objections in any court. There is some complaint that counsel could not infer that the constitutional questions referred to in the statute were federal questions, because the Supreme Court of Illinois had not so decided before this case. We have not been able to determine from the Illinois decisions cited above whether any of the constitutional questions held to be waived therein were federal until the present case. It is not, however, a forced or strained interpretation to hold that 'cases * * * in which the validity of a statute or construction of the Constitution is involved' include validity under, or construction of, both constitutions. When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case."

The Supreme Court of Illinois stated the rule cogently in *People* v. *Rosenthal*, 370 Ill. 244, at p. 247, where the Court said:

"The first two contentions present constructions of the constitution. The Civil Practice Act (Ill. Rev. Stat. 1937, chap. 110, par. 199) requires that all cases in which constitutional questions are raised must be taken directly to this court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the

> plaintiff in error or appellant is held to have waived the constitutional questions. (*People* v. *Terrill*, 362 Ill. 61, and cases there cited.) The constitutional questions urged by plaintiffs in error cannot be considered."

In the case first above cited, *Parker* v. *Illinois*, 333 U. S. 571, Parker was sentenced to jail for contempt of court. He did not seek to take the case directly to the Illinois Supreme Court, but instead took it to the Appellate Court of Illinois, where he sought to reverse on the grounds, among others, that it violated the First and Fourteenth Amendments to the Federal Constitution. The Illinois Appellate Court did not consider these Constitutional grounds. It sustained the order on non-constitutional grounds. On writ of error to the Illinois Supreme Court, the judgment of the Appellate Court was affirmed. The U. S. Supreme Court likewise did not consider the Constitutional questions which Parker again presented. The court said (333 U. S. p. 573):

> "For it is well-settled law in Illinois that if an appellant takes his case to the Appellate Court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. *People* v. *Rosenthal*, 370 Ill. 244, 247, 18 N. E. 2d 450, 452; *People* v. *McDonnell*, 377 Ill. 568, 569, 37 N. E. 2d 159, 160. That was the reason neither of the courts below passed on the federal constitutional questions tendered by petitioner. * * *".

Neither the Appellate Court nor the Supreme Court of Illinois could have passed on any Federal Constitutional question sought to have been raised by the petitioner in the case at bar because of the manner in which petitioner filed his appellate proceedings below.

2. The Record Does Not Show Affirmatively That a Federal Constitutional Question Was Decided by the Supreme Court of Illinois.

A second reason why this petition for writ of certiorari should not be granted is that it does not appear from the petition or from the record that the Federal question was presented for decision to the highest court of the State of Illinois having jurisdiction, or that its decision was necessary to the determination of the case, or that it was decided wrongly by that court. *Honeyman* v. *Hanan*, 300 U. S. 14, 18. It is a prerequisite to the jurisdiction of the Supreme Court to review a judgment of a state court that a Federal question was properly before the state court and that the state court based its decision on that claim. If a state court judgment is rested on a non-Federal question, *i. e.* on relevant state law, the Supreme Court is constitutionally barred from reviewing it. See dissenting opinion of Mr. Justice Frankfurter in *Konigsberg* v. *State Bar*, 353 U. S. 252, at page 275. It must appear that the Constitutional question presented was substantial, that it was necessary to the state decision, and that it was decided wrongly.

In the case at bar, the case was heard in the Superior Court of Cook County, Illinois. The result was adverse to the plaintiff (petitioner), who thereupon prosecuted an appeal to the Appellate Court of Illinois for the First District. The case there was heard on non-Federal grounds and the Appellate Court rendered a written opinion, which is found in Appendix A, page 1a, of the petition for writ of certiorari in this case. The Appellate Court did not consider any Constitutional grounds, which it could not do under the laws of the State of Illinois, but decided the case on four non-Federal grounds, pp. 4a and 5a. (See also petition for certiorari, p. 7.) Plaintiff (petitioner) then filed a petition for leave to appeal to the Supreme Court

of Illinois. In Illinois practice the petition for leave to appeal has replaced the common law petition for writ of certiorari, but it is substantially the same thing. Ill. Rev. Stat., chap. 110, § 75. The judgment of the Supreme Court was that the petition for leave to appeal be denied. The Supreme Court did not write an opinion.

The law of the State of Illinois is clear, that the denial of a petition for leave to appeal makes the judgment of the Appellate Court final. This Court held in *Minneapolis, St. Paul and Sault Ste. Marie Railway Company* v. *Rock*, 279 U. S. 410, to this effect, that the denial of a petition for certiorari (leave to appeal) makes the judgment of the Appellate Court final. While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it and is, therefore, in effect an affirmance of the judgment, citing *Soden* v. *Clancy*, 269 Ill. 98, 102; *People* v. *Grant*, 283 Ill. 391, 397. Such judgment is reviewable by the Supreme Court of the United States in a properly brought case. In the case first cited, the Court at p. 412 quotes from *Williams* v. *Bruffy*, 102 U. S. 248 at 255, as follows:

> "Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which by law it can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach." See also *Gregory* v. *McVeigh*, 23 Wall. 294, 304.

The statement of this rule has been made in *Graham* v. *White-Phillips Company*, 296 U. S. 27, which holds that denial of certiorari does not import approval of the reasons assigned by the lower court. The rule is also stated in *Cohen* v. *New York Life*, 132 F. 2d 496, where it is said:

> "It must be remembered always that denial of

certiorari by the Supreme Court imports nothing more than an approval of the conclusion reached by the lower court and is not to be construed as an approval of the reasons assigned by that lower court in reaching its conclusion." (p. 496)

We are, therefore, left to speculation as to why the Illinois Supreme Court denied the petition for leave to appeal. It did not deny it on Constitutional grounds because the alleged Constitutional ground was not properly presented to that court. It may have denied it on the non-Federal ground that petitioner adopted the wrong procedure to raise a Federal Constitutional question. That would seem logical in view of the decision in *Parker* v. *Illinois*, 333 U. S. 571. On the other hand, while the denial of the petition for leave to appeal did not act as an approval of the reasons given by the Appellate Court for its opinion, this court is not prevented from looking at those reasons to determine what might have been before the Illinois Supreme Court for consideration at the time of taking action. In *Lynch* v. *New York*, 293 U. S. 52, 54, the Supreme Court of the United States did look at the decision of the intermediate Appellate Court of New York for a clue as to what may have motivated the Court of Appeals of that state. In *Ellis v. Board of Education of Yonkers*, 349 U. S. 458, the Court of Appeals of New York wrote no opinion, but the Supreme Court of the United States examined the opinion of the intermediate Appellate Court. See Note 7, p. 463. There are four cogent non-Federal reasons given in the opinion of the Appellate Court in this case and on any one of them the petition for leave to appeal might have been denied. All of them are non-Federal. In addition, there is a compelling reason, that is, that the petitioner waived his Constitutional question by the procedure which he voluntarily elected.

B.

A Brief History of This Case.

The petitioner, Wesley Greene, as an individual taxpayer and citizen of Chicago, brought this suit April 10, 1957 in the Superior Court of Cook County against The Art Institute of Chicago and The Northern Trust Company, Trustee and Executor of the Estate of Benjamin F. Ferguson, Deceased. Petitioner set out four objectives of his suit:

(1) To vacate a decree of the Circuit Court of Cook County entered May 22, 1933, in a suit entitled "*Art Institute* v. *Otto Kerner, Attorney General*," No. B 269011; (this decree held that the word "monument" used in the creation of the B. F. Ferguson Monument Fund meant and included a monumental building, and that the income from said fund might be used by the trustees for that purpose).

(2) To vacate a decree of the Circuit Court of Cook County entered June 13, 1956, in a suit entitled "*The Art Institute of Chicago* v. *Latham Castle, Attorney General*," No. 55 C 249; (this decree was entered after the failure to build the monumental building authorized in 1933; the court again held that the word "monument" included memorial buildings and other forms of monument, and that a different building proposed to be built by the Trustees would be a memorial building and a "monument" within the meaning of the Ferguson Will).

(3) To secure an order on the defendant Art Institute to "comply with the Will of Benjamin F. Ferguson in administering the B. F. Ferguson Monument Fund, which is a charitable trust created thereunder, and for an accounting."

(4) To remove defendant The Northern Trust Company as Trustee under the Ferguson Will, and for an accounting.

In addition to the foregoing, in the prayers of the

complaint, petitioner asks that The Art Institute of Chicago be removed as Trustee of the B. F. Ferguson Monument Fund and that a Successor Trustee be appointed to administer said fund.

The sworn complaint is set out in full at the beginning of the record which has been filed herein and is also set out in full in "Additional Abstract of Record" also filed herein. The sworn complaint does not set out the wording of either decree or in what particular either decree reflects an injury on him, the petitioner, or on the public whom he undertakes to represent. He charges fraud and collusion in general terms, draws unwarranted conclusions, both criticizes and exculpates two Attorneys General, but fails to set forth the reasons why the two decrees should be vacated or why the two Trustees should be removed.

In one paragraph of his sworn complaint (Complt. par. 19, Addl. Abst. 11, 12), petitioner mixes some allegations of fact with conclusions and words of opprobrium, as follows:

> "(19) That in Case No. B 269011 the defendant, The Art Institute of Chicago by and through its attorneys, agents and servants, in *perpetrating its hoax on plaintiff* and other persons similarly situated, drafted its complaint, the Answer for the Attorney General, and the Decree and Order of Court not only on the same typewriter but also using the same stationery and using the blue backs of the Art Institute's Counsel as the blue backs for the Attorney General of Illinois; that on information plaintiff avers the filing of the Complaint, the answer and the entry of the Decree and Order by the Court took place on May 22, 1933, between the hours of 10:00 A. M. and 11:00 A. M. and by the *aforesaid collusive and fraudulent actions* perpetrated by the defendant, The Art Institute of Chicago, the defendants *accomplished their purpose* by having the Last Will and Testament of B. F. Ferguson *repudiated* under the protective cloak of the *voidable*

decrees on said date and *approved* the entire B. F. Ferguson Monument Fund for the use and benefit of The Art Institute of Chicago; that said Fund was then in excess of $1,200,000.00 and to date, plaintiff is informed approximates $1,600,000." (Italics ours.)

In the next paragraph 20, petitioner alleges that no oral testimony was taken. However, in paragraph 24, Additional Abstract 16, petitioner "avers that the integrity of the then Attorney General, Otto Kerner, is not impugned by the charges herein."

We urge the court to read the complaint and to observe the failure to allege the property right or the manner in which it was taken from petitioner without due process.

Each defendant filed motions directed to the complaint under Sections 48 and 49 of the Illinois Practice Act, which motions were sustained by the trial court. These motions set up, among other things, that petitioner did not have a legal right to sue and that the cause of action was barred by a prior judgment. The motions recited that the prior case (55 C 249) had been taken to the Appellate Court and there decided, and that in that opinion, entitled "*The Art Institute of Chicago v. Latham Castle, Attorney General*," 9 Ill. App. 2d, at 473, the court had held that the Attorney General and the State's Attorney have exclusive jurisdiction to enforce and construe charitable trusts. Petitioner has not seen fit to furnish this court with a copy of the opinion in this related case, so this respondent does so as Appendix A, page 15 of this response.

After the trial court sustained defendants' motions in bar to petitioner's suit, petitioner appealed to the Appellate Court of Illinois, First District, which sustained the trial court. The Appellate Court's decision is appended to the petition for certiorari as Appendix A at pages 1a and following thereto. An examination of that opinion reveals that the Appellate Court sustained the Superior Court on

four numbered grounds, pages 4a and 5a. Each of these grounds is non-Federal. After filing a petition for rehearing, which was denied (Appendix C, p. 7a), petitioner filed a petition for leave to appeal to the Supreme Court of Illinois (pp. 7a and 8a). Leave to appeal was denied without opinion (p. 8a). Subsequently, petitioner brought a petition for a writ of certiorari in the Supreme Court of the United States.

The Constitutional question claimed by the Petitioner is here presented for the first time. It was not presented to any of the courts below either by pleadings or by any other action by the petitioner. In his petition, petitioner now says that the question is whether the State of Illinois, without contravening the due process clause of the Fourteenth Amendment to the United States Constitution, denied petitioner, a contemplated beneficiary of a public charitable trust, his standing as an interested party in an action against respondents, trustees of a charitable trust, to vacate and set aside "contrived orders of court". The statement of petitioner, page 2, is somewhat incoherent. In effect, petitioner seems to say that Illinois, by adhering to the common law rule that a member of the public is represented by the Attorney General in any suit involving the enforcement of a public charitable trust, does thereby deprive the petitioner of his rights of due process (see Petition, page 10, last sentence of first paragraph).

Nowhere, prior to the filing of his petition in the Supreme Court of the United States, has Petitioner asserted this claim.

The complaint of petitioner is liberally sprinkled through with the use of words of fraud and collusion of this respondent and with occasional allegations that petitioner, plaintiff below, was deprived of property without due process of law. Nowhere in this petition for certiorari is

there a compliance with subparagraph (f) of paragraph 1 of Rule 23 of the Supreme Court which requires, "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In his sworn complaint (Para. 12(a), Add'l Abst. 6-8), Petitioner alleges that his rights in the property left in trust by B. F. Ferguson were vested and that they were "wrongfully taken from him without due process of law; that the deprivation of his said property right without due process of law" was made doubly certain by two decrees of the Circuit Court of Cook County, Illinois, one entered in 1933 and the other entered in 1956. The decree of 1933 Plaintiff alleges "was an unqualified hoax and was collusively planned and executed at the instance of the defendant The Art Institute of Chicago and ratified and condoned by the defendant The Northern Trust Company." Nowhere in his complaint does Petitioner allege that Illinois does not provide a remedy. His only allegations under the Fourteenth Amendment are in general terms, that he was the victim of fraud on the part of Respondent The Art Institute of Chicago and that the Attorney General of Illinois did not adequately represent the public in the suits

in question. All this is alleged in the sworn complaint, despite a specific allegation that the "integrity of the then Attorney General, Otto Kerner, is not impugned by the charges herein." (Complt. para. 24; Add'l Abst. 16).

Petitioner in his complaint also alleges that "he does not charge the Attorney Generals with any wrongful intent or conduct." (Complt. para. 15, Add'l Abst. 10.) He charges that "by their respective nominal conduct, they erroneously permitted their great offices to be used in derogation of their legal obligations in the representation of the Plaintiff and others similarly situated under the statutes of the State of Illinois, in that they were charged with knowledge in each case that the exactions of the Illinois statutes and requirements of due process were not met." Despite repetitious use of the words "hoax", "collusion", "fraudulent actions", and other words of vituperation, the only apparent charge of any wrongdoing by Respondent The Art Institute of Chicago and by the Honorable Otto Kerner, the then Attorney General of Illinois, is found in paragraph 19 of the complaint (Add'l Abst. pp. 11, 12), wherein it is charged that the complaint of Respondent The Art Institute of Chicago, the answer of the Attorney General, and the decree of the court were typed upon the same typewriter and using the same stationery and the same manuscript covers, and were all filed and the decree entered within the space of one hour on May 22, 1933. From this petitioner draws the unfair conclusion that the actions were collusive and fraudulent and the decree was voidable, and had been prearranged and agreed upon by the parties thereto without any evidence being adduced in open court, although the language of the decree recites that the proof was oral, documentary, and written, taken and filed. Plaintiff concludes that the language of the decree was authored by The Art Institute of Chicago and that the Attorney General did not represent the public interest in this matter.

Petitioner seems to have the idea that the Superior Court should have engaged upon a long hearing and a voluminous record should have been made. We call to this court's attention the fact that no building was built under the decree of 1933. In 1955, The Art Institute of Chicago filed another suit concerning the Ferguson Monument Fund in case No. 55 C 249. In this case various interested parties sought leave to intervene and one of them, "The National Sculpture Society", appealed to the Appellate Court from a decision of the trial court denying it leave to intervene. The action of the trial court was there affirmed. The decision is reported as *The Art Institute of Chicago* v. *Castle*, 9 Ill. App. 2d 473. Appendix A (p. 15) to this Response.

A full reading of the complaint below, Record 1, will reveal that Petitioner has filled it with words of vituperation, but no actual charges of fraud.

Wild words of vituperation do not adequately charge fraud.

Owens v. *Green*, 400 Ill. 380.
Smith v. *Board of Education*, 405 Ill. 143.

Respondent respectfully says that the complaint charges nothing and that the petition for certiorari is an imposition on the time of the court, and should be denied.

Respectfully submitted.

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EXHIBIT A.

DECISION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, IN THE CASE ENTITLED:

THE ART INSTITUTE OF CHICAGO, *Plaintiff*,
vs.
LATHAM CASTLE, Attorney General of the State of Illinois, *Defendant*,
NATIONAL SCULPTURE SOCIETY, *Petitioner to Intervene—Appellant*.

Reported
9 Ill. App. 2d 473.

MR. JUSTICE BURKE delivered the opinion of the Court.

On November 25, 1904, Benjamin F. Ferguson made his last will. The Northern Trust Company was named as trustee. He died on April 10, 1905. The will was admitted to probate in the Probate Court of Cook County and the estate was duly administered and distributed. Subparagraph (e) of the Fifth paragraph of the will reads:

"My said Trustee after paying the bequests hereinabove mentioned and establishing or realizing and keeping intact a permanent trust fund of not less than $1,000,000.00 shall annually thereafter or oftener, if required, pay the entire net income arising therefrom (after deducting its compensation as Trustee herein mentioned) to The Art Institute of Chicago, to be known as the B. F. Ferguson Monument Fund and entirely and exclusively used and expended by it under the direction of its Board of Trustees in the erection and maintenance of enduring

statuary and monuments, in the whole or in part of stone, granite, or bronze, in the parks, along the boulevards, or in other public places within the City of Chicago, Illinois, commemorating worthy men or women of America, or important events in American History. The plans or designs for such statuary or monuments and the location of the same shall be determined by the Board of Trustees of such Institute."

On May 22, 1933, the Circuit Court entered a decree in the case entitled "The Art Institute of Chicago, a corporation, *vs.* Otto Kerner, Attorney General of the State of Illinois;" construing the word "monument" to mean and include a memorial building. The decree authorizes the expenditure by the Art Institute of Chicago of moneys belonging to the fund for the erection of a memorial building east of the Illinois Central Railroad right of way in Grant Park to be the key building in a building program for the Institute which included several other buildings. The memorial building authorized by the decree has never been constructed.

In a complaint filed on January 7, 1955, by the Institute against the Attorney General of Illinois the plaintiff says that it now proposes to erect a B. F. Ferguson Memorial Building on a different site, that the present plans which have been completed by its architects and approved by its Board of Trustees provide for the erection of a five-story administration building in Grant Park immediately west of the right of way of the Illinois Central Railroad and immediately north of and adjacent to the present permanent Art Institute Building, rather than east of the railroad as contemplated at the time of the 1933 decree. Continuing, the complaint states that the building shall be used as an administration building for the Art Institute and shall contain offices, shops, studios and other rooms supplementing the existing facilities;

that the building shall be of a type of architecture that will, in the opinion of the trustees of the Institute, be suitable and fitting as a memorial building; that the building will be erected upon land owned by the Chicago Park District and that by contract between the District and the Institute the latter will have the permanent use and occupancy of the building. The complaint further recites that in view of the fact that the 1933 decree authorizes the expenditure by plaintiff of moneys from the fund for the erection of a memorial building as specifically described in that decree, the plaintiff is in doubt as to whether the language of the will as construed in the decree means and includes any other memorial building, and prays that the court construe the will as construed in the 1933 decree and determine whether the language of the will as in that decree construed means and includes any other memorial building, and whether the use of the funds may be properly expended by it for the erection and maintenance of a memorial building as described in the complaint.

The Attorney General filed an answer admitting the factual allegations and submitting the matters concerning the interests of the people of the State of Illinois to the consideration and protection of the court, praying that in the event a decree is entered pursuant to the complaint that the decree will contain provisions to protect the interests of the people. The National Sculpture Society filed an amended petition representing that it is a corporation not for profit created under the laws of New York, organized for artistic and educational purposes and for the purpose of fostering the development and appreciation of sculpture, spreading the knowledge of good sculpture, fostering the taste for and encouraging the production of ideal sculpture for households and museums, and promoting the decoration of public and other buildings, squares and parks with sculpture of a high class;

not limited to the institution of original suits. The vexation, delay and expense caused by attempts of individuals to intervene in pending suits to enforce or construe charitable trusts is as real and as great as that resulting from the filing of such suits by individuals whose only objectives are the promotion of private interests. We are convinced that the case of *Hartzell* v. *Hungate*, 223 Ill. App. 346, cited by the petitioner, is not applicable to the facts of the instant case. There the court found that a taxpayer in the City of La Harpe had at least a contingent interest in the fund.

The petitioner maintains that it has an interest in the cause and is uniquely equipped by the character of its membership and its half-century experience in the field of sculpture to render necessary assistance to the court to enable it to arrive at a just determination. The sole question is whether a memorial building different from the one authorized by the 1933 decree may be built at a slightly different location than originally authorized. In the determination of this question the National Sculpture Society has no interest and cannot be affected by the result. Neither the Society nor any of its members has any contractual relationship with or rights against the Art Institute as trustee of the fund. The mere hope of a commission is so remote as to be inconsequential. The beneficiaries of the charitable trust set up by the will are the people of the State of Illinois generally, not the sculptors who may be commissioned to erect statuary and not the architects and builders who may be employed to erect a memorial building. The Attorney General is vested with the right and duty to protect the people's interests in the enforcement of charitable trusts. The petitioner cannot contribute to the protection of the public interest in the question of whether one building or another be erected and whether

the building should be located just east or just west of the Illinois Central right of way.

The 1933 decree in which the then Attorney General was the defendant, posed the question whether the word "monument" in the will means and includes a memorial building and the further question whether the building described in that complaint constituted a memorial building within the meaning of the will. The decree decided that the word "monument" includes a memorial building and that the trustees of the Art Institute, in the exercise of their discretion under the will as construed, may use the moneys of the fund in the erection and maintenance of statuary and memorial buildings or other forms of monuments. That building not having been erected and the trustees now desiring to erect a building of a slightly different design in a slightly different location, presented this changed program to the Circuit Court and asked that court to resolve the doubt as to whether the use of the funds for a memorial building to Mr. Ferguson was limited to the building described in the decree. We are satisfied that the chancellor was right in deciding that the petitioner should not be permitted to intervene for the purpose of setting aside the 1933 decree.

The petitioner asserts that the present action is in reality for the modification and extension of the 1933 decree and in the nature of a complaint for review. The action is not one in the nature of a complaint for review. Bills of review fall into three categories into none of which the present action can be placed: (a) bills to review errors appearing on the face of the decree; (b) bills based upon newly discovered evidence; and (c) bills based upon allegations of fraud in the obtaining of the original decree. The instant case seeks the court's approval on the decision of the trustees to erect a building of a slightly different

design and in a slightly different location than the building authorized in the 1933 decree.

Finally, petitioner maintains that there is a serious question as to whether there is not a necessary party lacking, namely, the Northern Trust Company. The latter is the residuary trustee under the will, which directs that the trustee shall keep intact a permanent trust fund of not less than $1,000,000.00 and shall, after the payment of certain bequests, annually pay the entire net income arising therefrom to the Art Institute, to be held as the B. F. Ferguson Monument Fund. When the income payments have been made to the Art Institute, the obligations and duties of the trust company with respect thereto are at an end. The will provides that the income received by the Art Institute shall be held by it as the B. F. Ferguson Monument Fund and shall be entirely and exclusively used and expended by it under the directions of its Board of Trustees in the erection and maintenance of enduring statuary and monuments. The testamentary trustee is not a necessary party to a suit to enforce the proper use of the funds and it was not necessary that it be made a party.

For the reasons stated the order of the Circuit Court of Cook County is affirmed.

Order affirmed.

Friend, *P. J.*, and Niemeyer, *J.*, concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 283

WESLEY GREENE,

Petitioner,

vs.

THE ART INSTITUTE OF CHICAGO, AN ILLINOIS CORPORATION NOT FOR PROFIT, AND THE NORTHERN TRUST COMPANY, A CORPORATION, TRUSTEE AND EXECUTOR OF THE ESTATE OF BENJAMIN F. FERGUSON, DECEASED,

Respondents.

BRIEF OF RESPONDENT, THE NORTHERN TRUST COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF OF RESPONDENT, THE NORTHERN TRUST COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Petitioner seeks review in this Court under the provisions of 28 U. S. C. § 1257(3). Respondent, The Northern Trust Company, asserts that this Court has no jurisdiction to grant such review, because (a) the decision below did not depend upon the determination of a federal question, and (b) any possible federal question raised by petitioner's complaint was waived by petitioner, under the laws of the State of Illinois, when petitioner failed to appeal directly to the Supreme Court of Illinois, as is required under the laws of Illinois in all cases where constitutional questions are involved.

QUESTIONS PRESENTED.

1. Will this Court review a decision of a State Court when it appears from the record that the decision of the State Court is adequately supported by independent grounds which do not involve the determination of a federal question?

2. Has petitioner, having waived all constitutional questions by appealing in the first instance to the Appellate Court of Illinois, rather than to the Supreme Court of Illinois, any standing to seek certiorari in this Court?

STATEMENT.

Petitioner's Statement fails to disclose adequately the special and limited position of respondent The Northern Trust Company, as Trustee under the will of Benjamin F. Ferguson. The only duty imposed upon The Northern Trust Company, as Trustee under Mr. Ferguson's will, was to pay the *income* from the trust estate to The Art Institute of Chicago (Abst. 3). The Northern Trust Company, as Trustee, has paid the income from the trust estate to The Art Institute of Chicago, and has preserved the principal of the trust estate intact. There is no controversy over these facts. This case is concerned only with the use of the income fund which has been accumulated by The Art Institute of Chicago, known as the B. F. Ferguson Monument Fund. Under Mr. Ferguson's will, The Northern Trust Company, as Trustee, had no power or duty with respect to the income from the Ferguson estate except to pay it over to The Art Institute of Chicago, which it did.

Respondents moved the Superior Court to strike and dismiss the complaint on the grounds, *inter alia*, that petitioner did not have legal capacity to sue; that the cause was barred by a prior judgment; and that the complaint did not

allege facts sufficient to state a cause of action (Abst. 5; Addl. Abst. 20). In addition to these motions, The Northern Trust Company moved to dismiss the complaint for failure to allege any facts showing any misconduct of any kind on the part of The Northern Trust Company, as Trustee, or any instance or particular in which said Trustee failed in any manner to perform its full duties as Trustee under the Will of Benjamin F. Ferguson, deceased (Abst. 11).

Petitioner's complaint was dismissed by the Superior Court of Cook County, Illinois, "on the separate motions of the defendants to dismiss the suit." The Appellate Court of Illinois in its opinion affirming this order of the Superior Court, did not discuss the special position of The Northern Trust Company, as Trustee.

ARGUMENT.

I.

THE DECISION BELOW IS ADEQUATELY SUPPORTED BY INDEPENDENT GROUNDS WHICH DO NOT INVOLVE THE DETERMINATION OF A FEDERAL QUESTION, SO THAT NO QUESTION IS PRESENTED FOR REVIEW IN THIS COURT.

A. The Question Argued in the Petition Herein Is Not Involved in This Case.

It is an elementary rule that the exclusive power to enforce a charitable trust is vested in the Attorney General, and that a member of the public has no standing, as such, to sue for the enforcement of the trust. In Professor Scott's work "The Law of Trusts," 1956 Ed., Vol. 4, Sec. 391, page 2760, the author states:

> "On the other hand, a person who has no interest in the performance of the trust, no interest other than as a member of the community, cannot maintain a suit for the enforcement of the trust. (Citing cases.) He may, if he can, induce the Attorney General to bring a suit, * * *. But a third person who has no special interest cannot himself maintain the suit. If a third person were permitted to sue as a matter of right it would be possible to subject the charity to harassing litigation. Thus where a testator left his estate in trust to establish and maintain an art museum in a City, a resident and taxpayer of the City cannot maintain a suit to enforce the trust." (Citing *Dickey v. Volker*, 321 Mo. 235, cert. den. 279 U. S. 839.)

This rule is followed in Illinois. *Art Institute of Chicago v. Castle*, 9 Ill. App. 2d 473; *Peo. ex rel. Courtney v. Wilson*, 327 Ill. App. 231; *Kolin v. Leitch*, 343 Ill. App. 626. Pre-

sumably the application of this rule does not involve any question of due process of law.

The gist of petitioner's argument is that to prevent a citizen from suing to enforce a charitable trust in a case where the trustee and the Attorney General were shown to be acting fraudulently would deprive the citizen of property without due process of law. This issue is not involved in this case, however, and cannot be considered here. Petitioner, in his statement of the "Question Presented" and throughout his petition, incorrectly states the holding below in his present attempt to raise this question.

This suit was an express attempt to make a collateral attack upon final orders of the Circuit Court of Cook County, Illinois, entered in 1933 and 1956 involving the use of the B. F. Ferguson Monument Fund by the Art Institute of Chicago, its trustee. This is a charitable trust. The interest of the public in this trust was represented in the 1933 and 1956 cases by the Attorney General of the State of Illinois. Petitioner sought to avoid the 1933 and 1956 decrees by charging that the 1933 decree was the result of fraud and collusion. (It will be noted that the complaint did not charge that the 1956 decree was fraudulent, however, nor did it show any adequate reason why that decree should not be binding upon petitioner.) Petitioner's charges against the 1933 decree were unsupported by any factual allegations of fraud or collusion. Instead, the charges in the complaint consisted almost entirely of expletives and vituperation such as "fraud and collusion," "unqualified hoax," "collusive and fraudulent actions," "scheme and hoax," and similar words, including the charge that the defendants "perpetrated ethical and cultural genocide upon the plaintiff." The complaint was dismissed by the Superior Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the order of dismissal for reasons set forth in the opinion (Appendix A

of the petition herein), including a holding that there was no sufficient allegation of facts in the complaint to show fraud.

Thus, the courts below have held that plaintiff has not alleged fraud under the rules of pleading and of substantive law applicable to this case. Petitioner has ignored this holding, and frames his entire petition as though an effective allegation of fraud had been made. For example, on p. 9 of the petition, he states:

> "Thus, the Supreme Court of Illinois has sanctioned a rule of law which in effect immunizes both the Attorney General of Illinois and the trustees of a charitable trust from a collateral attack once the trustees have succeeded in procuring a fraudulent decree by which the trustees capture the trust."

This statement has no basis in the holding below, in that it assumes that the courts below have found that the 1933 decree was fraudulent, contrary to the plain statement of the Appellate Court that there was "no sufficient allegation of facts to show fraud."

The question posed by the petition was not involved in the decision below and cannot be considered here.

The case of *Hansberry* v. *Lee*, 311 U. S. 32, on which petitioner relies, does not support petitioner's argument. In that case, this Court held that a state court had deprived persons of due process of law by its adjudication that they were bound by a judgment in an earlier litigation *in personam* in which they were not parties (and had interests contrary to those of the parties to the litigation) and which was not a class suit. In the present case, on the other hand, the state court was considering earlier litigation *in rem* in which the petitioner and other members of the public as a class were represented by the Attorney General. As this Court stated in *Hansberry* v. *Lee*, 311 U. S. 32, at p. 42:

> "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where * * * the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter."

This doctrine is precisely applicable in the present case, where petitioner and all other members of the public were represented as a matter of law by the Attorney General.

B. As It Relates to Respondent The Northern Trust Company, the Decision Below Is Supported by Separate Independent Grounds Involving No Federal Question.

In addition to the foregoing considerations which apply to both respondents, it is clear that no federal question was involved in the holding below with respect to respondent The Northern Trust Company.

This suit was concerned with the use of the B. F. Ferguson Monument Fund, a trust fund consisting of accumulated income held by The Art Institute of Chicago, as trustee. In 1933 and 1956, certain decrees were entered in the Circuit Court of Cook County, Illinois, with respect to that fund. This suit was filed for the express purpose of attacking collaterally the 1933 and 1956 decrees, on the ground that the 1933 decree was the result of fraud. There is no controversy over the facts that:

> (a) The Northern Trust Company is not and never was trustee of the B. F. Ferguson Monument Fund, which is the subject of this suit, and
>
> (b) The Northern Trust Company was not a party to the 1933 or 1956 proceedings.

The separate and limited duties and powers of The Northern Trust Company under the Ferguson will were recognized by the Appellate Court of Illinois in *Art Institute of Chicago* v. *Latham Castle*, 9 Ill. App. 2d 473, which

affirmed the denial of the National Sculpture Society for leave to intervene in Circuit Court case No. 55 C 249, one of the cases attacked by Petitioner in his complaint herein. In holding that The Northern Trust Company was not a necessary party to that proceeding, the Appellate Court said, at page 481:

> "Finally, petitioner maintains that there is a serious question as to whether there is not a necessary party lacking, namely, The Northern Trust Company. The latter is the residuary trustee under the will, which directs that the trustee shall keep intact a permanent trust fund of not less than $1,000,000 and shall, after the payment of certain bequests, annually pay the entire net income arising therefrom to The Art Institute, to be held as the B. F. Ferguson Monument Fund. *When the income payments have been made to the Art Institute, the obligations and duties of the trust company with respect thereto are at an end.* The will provides that the income received by the Art Institute shall be held by it as the B. F. Ferguson Monument Fund and shall be entirely and exclusively used and expended by it under the directions of its Board of Trustees in the erection and maintenance of enduring statuary and monuments. The testamentary trustee is not a necessary party to a suit to enforce the proper use of the funds and it was not necessary that it be made a party." (Emphasis supplied.)

This decision is in conformity with the general rule applicable in cases of this nature. Bogert, "Trusts and Trustees," § 413; *Dillaway* v. *Burton*, 256 Mass. 568, 152 N. E. 13.

These authorities make it clear that The Northern Trust Company had no authority to question the use of the Monument Fund by The Art Institute, its trustee.

The complaint herein contained no charge that The Northern Trust Company had failed to perform its duties under the Ferguson will. The only charges against The

Northern Trust Company are vague charges that it "ratified and condoned" the 1933 proceedings in the Circuit Court. These charges are unsupported by any allegation of fact whatever.

Since the Appellate Court of Illinois held that petitioner's entire complaint was without merit, it was unnecessary for the Court to discuss the special position of The Northern Trust Company. Nevertheless, the decision of the Appellate Court affirming the order dismissing the complaint was proper, with respect to The Northern Trust Company, for the special reasons set forth above, independent of the merits of petitioner's case against The Art Institute. Thus, the decision below involved no federal question with respect to this respondent, and cannot be reviewed here.

II.

PETITIONER HAS WAIVED ALL CONSTITUTIONAL QUESTIONS BY APPEALING TO THE APPELLATE COURT OF ILLINOIS, RATHER THAN TO THE ILLINOIS SUPREME COURT, AND HAS NO STANDING TO SEEK REVIEW IN THIS COURT.

The Civil Practice Act of Illinois provides that:

> "Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved." Ill. Rev. Stats., ch. 110, § 75.

As construed by the courts of Illinois, this rule means that although a constitutional question may have been raised by the pleadings, or on trial, when the appellant takes his case to the Appellate Court, he thereby waives any constitutional question. This rule applies even though the constitutional question be one involving the Constitution of the United States. *City of Edwardsville* v. *Central Union Telephone Company*, 302 Ill. 362 (1922).

See also *People* v. *Terrill*, 362 Ill. 61 (1935); *People* v. *Rosenthal*, 370 Ill. 244 (1938) and *People* v. *Parker*, 396 Ill. 583 (1947).

This Court considered the effect of a waiver under this provision of Illinois law in *Central Union Co.* v. *Edwardsville*, 269 U. S. 190 (1925), and held that the doctrine of waiver under Illinois law was fair and reasonable and binding upon the Supreme Court of the United States. The Court said, in an opinion written by Mr. Chief Justice Taft, at p. 194:

> "But counsel for plaintiff in error insist that it is for this Court to determine finally whether a litigant in a state court has waived his federal right, citing *Davis* v. *O'Hara*, 266 U. S. 314; *Davis* v. *Wechsler*, 263 U. S. 22; *American Railway Co.* v. *Levee*, 263 U. S. 19; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Union Pacific Railway Company* v. *Public Service Commission*, 248 U. S. 67. But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John* v. *Paullin*, 231 U. S. 583, 585: 'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law,'—and many cases are there cited.
>
> "It sems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the

other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court."

This Court expressly adhered to the *Central Union* decision in *Parker* v. *Illinois*, 333 U. S. 571 (1947). The opinion of the Court, written by Mr. Justice Douglas, recited that under Illinois law

"The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

These cases leave no doubt but that petitioner has waived all constitutional questions under the rules of Illinois appellate procedure, and having done so, has no standing to seek certiorari in this Court.

CONCLUSION.

It is respectfully submitted that the decision below is adequately supported by independent grounds which do not involve the determination of a federal question; that the question argued in the petition is not involved in this case; that petitioner has waived all constitutional questions; and that for these reasons the writ of certiorari should be denied.

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September 17, 1958.